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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 143

SYLVIA BENNETT, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On February 25, 1963, petitioner received a career appointment, subject to a one year probationary period, as a clerk-typist employed by the Inspector of Naval Materiel, Newark, New Jersey. As part of her application for employment, petitioner completed Standard Form 85, entitled "Security Investigation Data For Non-Sensitive Position." Question 8 required applicants to list "organizations with which affiliated (past and present) other than religious or

political organizations * * *." Petitioner answered "None." (Pet. App. 1a).

A security investigation of petitioner, completed after she commenced work, indicated that, in fact, in 1950 and 1951 she had been a member of the International Workers Order, an organization included in the Attorney General's list of subversive organizations (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; see, also, 182 F.2d 368 (C.A. D.C.)). Thereafter, on June 21, 1963, petitioner was notified by the Supervising Inspector of Naval Materiel for the district in which she was employed that it was proposed to separate her from her position. The reasons given in this notice for the separation were as follows (Pet. App. 1a-2a):

> You are charged with deliberate falsification of appointment papers in that you did not acknowledge membership in the International Workers Order. Information made available to this activity indicates that you were a member of this organization from 12 February 1950 until March 1951. Your certificate number as a member of Local 517 JA was 418008. Standard Form 85 which you completed on 25 February 1963 reflected the answer of "None" to Question 8, "Organizations with which affiliated (past and present) other than religious or political organizations or those which show religious or political affiliations". Your omission of this essential information is considered to be a serious action as your signature on the SF 85 was preceded by the certification that "I certify that the above statements are true, complete, and correct to the best of my knowledge and belief, and are made in

good faith". This certification admonishes that a false statement on the form is punishable by law.

Petitioner was also informed by the June 21 notice that she could reply to the charge contained in it. On June 25, 1963, she submitted a written reply denying the charge that she had been a member of the International Workers Order, asserting that her answer to Question 8 had been truthful, and declaring further that during the period in question she had spent most of her time seeking medical treatment for a kidney infection. (Pet. App. 2a, 4a, 12a). On June 27, the Supervising Inspector replied that petitioner's letter did not controvert the information available to his office concerning her past membership in the International Workers Order and that petitioner was therefore to be separated from her position on July 5, 1963. Petitioner thereafter retained a lawyer who, on July 2, 1963, wrote to the Inspector reaffirming her denial of the charge and requesting that petitioner's "summary dismissal * * * be rescinded, and held in abeyance pending a Hearing on said charges." The letter referred to "[t]he stigma of a dismissal predicated upon * * * charges" of "deliberate falsification, etc., and alleged membership in a subversive organization" and suggested "the possibility of mistaken names." (Pet. App. 2a, 4a-5a, 13a). This request for a hearing was denied, and petitioner was removed from her employment on July 5, 1963. Petitioner's appeals to the Secretary of the Navy and the Civil Service Commission were denied on August 8 and 9, 1963. (Pet. App. 2a).

The present action for loss of pay was commenced in the Court of Claims on July 1, 1964. Petitioner alleged that her discharge had been unlawful (1) because the advance notice and final decision of the agency had failed to set forth all the facts needed to enable plaintiff to understand the reason for the proposed action and to join issue therewith, and (2) because of the failure to afford her a hearing prior to the effectuation of her discharge. Both petitioner and the United States moved for summary judgment. The Court of Claims, Judge Davis dissenting, granted the United States' motion, denied petitioner's cross-motion, and dismissed petitioner's petition (Pet. App. 8a).

At the outset, the court recognized "that a stigma attaches to a dismissal for alleged membership in a subversive organization" (Pet. App. 8a). It also recognized that the Navy's applicable regulations (Navy Civilian Personnel Instruction 352, 4-8c), drafted pursuant to the Civil Service Commission's regulations (5 C.F.R. 2.301(c)(2) and 5 C.F.R. 22.302(a)(1963 Supp.)), required that, where a probationary employee was to be separated for "pre-appointment" conditions, the employee be given "specific and detailed reasons," including "all the facts needed to enable him to understand the reasons for the proposed action and to join issue with it." * The court held, however, that these requirements had been fully

* The applicable regulations are set forth in full in the Appendix to this memorandum, *infra*, pp. 8-9. At the time of her separation, petitioner, a probationary or trial employee, was not in the classified civil service. She was, therefore, not covered by 5 U.S.C. 652.

complied with in the June 21, 1963, notice sent to petitioner (Pet. App. 4a-5a). Finally, the court rejected petitioner's argument that the applicable regulations required the Navy to afford hearings to all probationary employees separated for pre-appointment reasons (Pet. App. 6a-7a).

In his dissent (Pet. App. 8a-16a), Judge Davis agreed with the court's rejection of petitioner's general claim that the applicable regulations required a hearing to be afforded to all probationary employees charged with pre-appointment misconduct (Pet. App. 16a). In Judge Davis' view, however, the Navy had not complied with its own regulations concerning notice of charges before discharge in petitioner's case. Specifically, Judge Davis believed that, in view of the security implications of the discharge, "plaintiff should have received some better statement" "as to the location of the 'local,' the person or persons said to have provided the information to the Government, any documentary backing for the charge (such as an IWO membership list, a membership card in plaintiff's writing or name, or a prior admission by her of membership), the nature of her purported membership, or the like. * * * [I]f we presuppose her innocence—as we must when we pass on the validity of the charge—it is hard to see how she could 'join issue' with so general an indictment, except by the futile gesture of offering a wholesale denial, as she did" (Pet. App. 11a-12a). Judge Davis believed that petitioner had adequately raised this point by requesting a hearing while stating that the charge was wholly untrue and mistaken.

DISCUSSION

In this Court, petitioner does not urge that she had a right to a hearing before discharge, but relies entirely upon Judge Davis' views in the Court of Claims regarding the adequacy of the information afforded petitioner prior to her discharge (Pet. 4). We construe the applicable regulation—requiring "specific and detailed reasons" including "all the facts needed to enable" the employee "to join issue with" the proposed discharge—as indicating that the government should, where possible, provide sufficient information to afford the employee the opportunity to rebut the case against him. See *Greene* v. *McElroy*, 360 U.S. 474, 496. In light of the suggestion in the dissenting opinion that the notice given to petitioner of the reasons for her discharge might not, in fact, have afforded her this opportunity in this case, the Solicitor General has reviewed the administrative file in order to determine whether additional information could have been provided for this purpose. This review has revealed that the evidence upon which the charge against petitioner was based—evidence which was entirely documentary in nature—could have been shown to petitioner, and would unquestionably have afforded her a full opportunity to attempt to rebut the specific basis for the charge against her. While the United States argued in the Court of Claims that the relatively detailed information which was, in fact, given to petitioner afforded an adequate basis for rebuttal of the charge—especially in the absence of a specific request by petitioner for further information—we do

not disagree with Judge Davis' view that the additional documentary evidence upon which the charge was actually based should have been made available to petitioner in order to remove any doubt as to her ability to meet the charges against her with more specificity than the submission of a general denial. We also agree that petitioner adequately stated and preserved this objection in the circumstances. We therefore acknowledge that petitioner's separation from employment was invalidly consummated and respectfully suggest that the petition for a writ of certiorari be granted, the judgment of the Court of Claims vacated, and the case remanded to that court for further proceedings.

THURGOOD MARSHALL,
Solicitor General.

August 1966

APPENDIX

REGULATIONS INVOLVED

1. 5 C.F.R. 2.301(c)(2) (1963 Supp.) provides:

If an agency decides to terminate an employee during the probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the action shall be processed in the same manner as actions taken under Subpart C of Part 22 of this Chapter and the employee shall have the right of appeal provided in § 22.304 of that subpart.

5 C.F.R. 22.302(a) (1963 Supp.) provides:

Notice of proposed adverse action. An employee against whom adverse action is sought shall be given advance written notice stating the reasons, specifically and in detail, for the proposed action.

2. Navy Civilian Personnel Instruction 352, 4-8c. (1)-(2) (22 June 1962) provides:

Procedure when separation is proposed for reasons based on conditions that existed before appointment ("pre-appointment" conditions, subparagraph 4-8a (2) above.)

(1) In this situation the probationer is entitled to:

(a) Five days' advance written notice of action proposed and proposed effective date.
(b) Specific and detailed reasons
(c) Right to reply and to consideration of reply
(d) Final decision
(e) Appeal to the Civil Service Commission (procedure only)

(2) Note particularly that when proposed Separation-Disqualification is based on pre-appointment reasons, the probationer is entitled to specific and detailed reasons, i.e., all the facts needed to enable him to understand the reasons for the proposed action and to join issue with it.

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